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Wendell H. Shanner

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JURISDICTION IN SPECIFIC PERFORMANCE CASES WHERE DEFENDANTS ARE NON-RESIDENTS

WENDELL H. SHANNER[1]

THE authority of this court is only to regulate a man's conscience and ought not to affect the estate. This court must *agere in personam* only."[2] Thus did Lord Nottingham, in 1682, formulate—from what might well have been considered a maxim of power only—a doctrine of limitation upon the jurisdiction of chancery. That no inherent reason of jurisprudence compelled this formulation of the maxim sufficiently appears from the chancellor's general and uninterrupted use of the writ of sequestration from the time of Bacon. Equally persuasive of the existence of an early in rem jurisdiction in equity was the free use, as long ago as the reign of Elizabeth, of the writ of assistance. Nevertheless, this proclamation of chancery, whereby it disclaimed any purpose of invading the jurisdiction of the common law judges, served well the exigencies of the time; for it allayed judicial strife and thus enabled the chancellors to accomplish by stealth what they could never have done by an open and avowed encroachment upon the common law jurisdiction. Furthermore, it is probable that the relief afforded by the peculiar principles of equity was effectually administered by the process of contempt and

[1] Professor at Chicago-Kent College of Law.
[2] Arglasse v. Muschamp, 1 Vern. 75, 77; 23 Eng. Rep. 322.

that an in rem jurisdiction would have appeared to the early chancellors as a mere surplusage of power.

The development of international trade and the expansion, during the eighteenth century, of the old world into the new, together with the peculiar political organization of the North American continent into separate states, introduced an era of absentee ownership in land quite unsuited to the exclusive in personam jurisdiction of equity. However, the maxim that equity acts in personam, understood as a limitation of judicial action, had found such firm lodgment in the learning of chancery that it was not until legislative intervention, at the close of the eighteenth century, that the distinctive principles of equity became more broadly effective by their direct operation upon property situated within the territorial jurisdiction of the court.

Maryland, it appears, was the first of the American jurisdictions to provide by statute (1785) that should a party neglect or refuse to perform a decree requiring him to make a conveyance, release, or acquittance, "such decree shall stand, to be considered and taken in all courts of law and equity to have the same operation and effect as if the conveyance, release, or acquittance had been executed conformably to such decree." Similar statutes were enacted in New Jersey and Tennessee during the years of 1799 and 1801 respectively. At present all states except New Mexico, New Hampshire, and Nevada, have statutes which, though varying in scope and effect, exhibit the common characteristic of making certain decrees—historically considered in personam only—operate, under certain conditions, directly upon the subject-matter of the controversy, thereby accomplishing the desired end without the co-operation of the party. The extent to which such statutes, either directly or by the accident of mistaken applicability, have enlarged the authority of courts of equity and enabled them to give an in rem effect to decrees for the specific performance of contracts, has been a matter of judicial inquiry in most of the American jurisdictions.

The comparatively early and general appearance of these statutes among the several states has necessarily

prevented a division of the authorities into an earlier and a later group separated by a definite line of statutory change. Indeed, all but a few of the reported cases disclose attempts by parties complainant to support their claims, to the relief of specific performance against non-resident defendants over whom the court has acquired jurisdiction by constructive service, upon some statutory foundation which it was contended had the effect of giving an in rem aspect to decrees for specific performance. The courts have frequently found that such statutes did not accomplish the supposed change, and it is mainly in such cases that we find the jurisdiction of equity stated in the language of the early precedents.

Perhaps the leading authority of this country, fixing the boundaries of chancery's general jurisdiction as it existed independently of statute, is *Spurr, et al.* v. *Scoville.*[3] There the defendant, an inhabitant of the state of Connecticut, had contracted with the plaintiff to convey title to certain real estate situated in Massachusetts. Upon defendant's refusal to perform the contract, plaintiff sued out a writ of attachment in which was inserted a bill in equity for specific performance of the contract. The defendant's real estate in Berkshire, Massachusetts, was attached on the writ, and service was had by delivering to defendant in Connecticut a copy of the writ and bill. The jurisdiction of the court was questioned by a demurrer to the bill. In sustaining the demurrer and dismissing the bill, the court said: "This is strictly a proceeding in personam. There is but one person who is the party defendant, and he is not a passive party, but must be eminently active in the performance of any decree which may be made against him . . ." and: "In the particular class of cases in which courts of equity are called upon to decree a specific performance of contracts respecting lands, it seems well established, by the elementary writers, and the decisions, both English and American, that the party against whom the decree is sought must be within the jurisdiction of the court."

The court experienced no difficulty in reaching its conclusion despite a statute,[4] then effective in that jurisdic-

[3] 3 Cush. (Mass.) 578.
[4] Gen. St. of Mass., Ch. 100, par. 15.

tion, the possibly applicable part of which was:

When a person, seized or possessed of real or personal property, or an interest therein, upon a trust, express or implied, is under the age of twenty-one years, insane, out of the commonwealth, or not amenable to the process of any court therein, which has equity powers, and where in the opinion of the Supreme Judicial Court or of a Probate Court it is fit that sale should be made of such estate or of an interest therein, or that a conveyance or transfer should be made thereof, in order to carry into effect the object of the trust, the court may by decree direct such sale, conveyance or transfer to be made, and may appoint some suitable person in the place of such trustee, to sell, convey or transfer the same in such manner as it may require. If a person so seized or possessed of an estate, or entitled thereto upon a trust is within the jurisdiction of the court her or his guardian may be ordered to make such conveyance as the court may deem proper.

A very liberal construction of this section might have enabled the court to retain jurisdiction of the cause to frame a decree of specific performance on the theory that the defendant vendor was a trustee "out of the commonwealth or not amenable to the process of any court therein." As no mention of this statute is made in the opinion it is quite possible that the court's attention was not directed to it. In any event, its utility in broadening the in rem jurisdiction of courts of equity in cases of specific performance was not judicially recognized until 1875 when the Supreme Court of Massachusetts in *Felch* v. *Hooper, et al.*[5] decreed specific performance of a contract to convey lands situated in Massachusetts, upon facts similar to those before the court in *Spurr* v. *Scoville.* However, the plaintiff in *Felch* v. *Hooper* had entered into possession of the lands to be conveyed and, with the knowledge and acquiescence of the defendant, had made valuable and permanent improvements thereon. This circumstance appears to have enabled the court to say that the non-resident owner was a trustee and that, accordingly, there was jurisdiction in rem under the statute to decree specific performance and make the

[5] 119 Mass. 52.

decree effective by appointing a resident trustee to execute it by conveying title to the plaintiff.

In a later case, *Merrill, et al.* v. *Beckwith,*[6] decided in 1895, the court held that where the relation between the parties is simply that of contract there is, correctly speaking, no trust created but merely a contract of sale and purchase of which a court of equity will, under certain circumstances, decree a specific performance. But, when the person agreeing to purchase has been allowed by the owner to enter upon the land and make improvements a trust is created in his favor. It would therefore seem that in Massachusetts there is no jurisdiction in rem in the specific performance cases unless special equities exist in favor of the resident plaintiff so that the non-resident party may be deemed a trustee under the statute. This application of the statute, of course, results from a distinctly liberal construction of its provisions.

When the conveyance sought will require the execution of personal covenants by those against whom the suit for specific performance proceeds, the general powers of a court of equity are not aided by a statute authorizing the appointment of a trustee to execute the decree, and, therefore, service by publication on non-resident defendants will not supply a jurisdictional basis for such a decree. In holding that it was without jurisdiction specifically to enforce a contract for the execution of a ninety-nine year lease which was to contain certain personal covenants of the lessors, where certain of them were non-residents and were served by publication, the Supreme Court of Maryland said:

Decrees for specific performance are against the person bound by the contract; they are in personam and not in rem. . . . Therefore, it is essential, to the effective character of the decree, that the parties, against whom it is made, be within the jurisdiction and reach of the court. If they be beyond its reach and coercive power, the court is without the means of enforcing its decree. Neither process of contempt nor injunction will aid the court or affect the parties beyond its jurisdiction. Being a mere personal decree, to have effect beyond the

[6] 163 Mass. 503.

jurisdiction of the state where it is rendered, it must be founded either upon personal service of process or upon a voluntary appearance of the party.[7]

It is apparent that where courts have found such statutes inapplicable and have by their decisions completely disassociated these provisions from the traditional criteria whereby a distinction is taken between actions in rem and actions in personam, the decrees must be formulated upon principles established by precedent alone. Such was the situation in *Silver Camp Mining Company* v. *Dickert*.[8] A statute provided:

When the person on whom the service of a summons is to be made resides out of the state, or has departed from the state, or conceals himself to avoid the service of summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause service of summons to be made by publication thereof.[9]

Service had been obtained on the defendant, a resident of the state of Utah, under the authority of the foregoing section and the complainant insisted that the court had thereby obtained jurisdiction to make a decree effective in rem. The court, after deciding that a suit for specific performance was a suit which, if successful, must terminate in a decree operative in personam only, referred to this section by adopting the language of the opinion in *Roller* v. *Holly*,[10] as follows:

Obviously this article has no application to suits in personam. The article must then be restricted to actions in rem; but to what class of actions, since none is mentioned specially in this article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a pro-

[7] Worthington, et al. v. Lee, et al., 61 Md. 530.
[8] 31 Mont. 488.
[9] Code of Civil Procedure (Mont.), sec. 637.
[10] 176 U. S. 398.

cedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against non-resident defendants.

In *Hollingsworth* v. *Barbour*,[11] the validity of a conveyance by the court's commissioner, pursuant to decree based on service by publication, was sought to be sustained under a statute authorizing such service against non-residents in suits by persons claiming lands as locators. The pertinent provisions of the statute are:

Where any person or persons, their heirs or assigns, claim land as locator, or by bond or other instrument in writing, they may institute a suit in equity, having jurisdiction in such cases; and when the party, having died, and the legal title descended to his heirs, the complainant may proceed to obtain a decree for the land, though the particular names of the heirs be unknown and not particularly named in the suit, although they may be residents of the commonwealth or not, but in such cases, it shall be advertised eight weeks in one of the gazettes of this state, requiring such heirs or representatives to appear and make defense.

The court in construing the statute reached the conclusion that the jurisdiction authorized thereby was special and limited and as the complainant was not a locator the court was without jurisdiction to direct the conveyance. It then declared the rule applicable as follows:

The case under consideration is not properly a proceeding in rem; and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of proceedings in rem, so far as to dispense with service of process on the party. There is no seizure nor taking into the custody of the court the land so as to operate as constructive notice. Constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders of publication, and providing that the publications, when made, shall authorize the courts to decree. It has already been shown that this case is not within the provisions of any statute.

[11] 4 Pet. (U. S.) 466.

Nor can a special power conferred by statute be given effect beyond the precise scope of the enactment so as to authorize proceedings generally against property of non-residents by a mere publication of notice. In *Boswell's Lessee* v. *Otis*,[12] the bill gave the proceeding the form of a suit for specific performance of a contract to convey realty. The suit, however, terminated in a money decree in which it was also adjudged that the decree should have the same operation and effect as a judgment at law and be a lien on all the real estate owned by the defendant, a non-resident, within the county. The statute gave jurisdiction over the rights of absent defendants on publication of notice, "in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract." Execution issued against a parcel of land wholly unconnected with the contract, specific performance of which was the ostensible purpose of complainant's suit. The Supreme Court refused to sustain the jurisdiction of the lower court to affect land not mentioned in the contract and in doing so stated:

A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is, substantially, of that character. . . . Under this statute[13] the bill of Hawkins purports to have been filed. But without reference to the other lots sold under the decree there is no pretense to say that the bill had any relation to the title or boundaries of lot No. 7, or to any contract for the conveyance of the same. And it is only in these cases that the act authorizes a chancery proceeding against the land of non-residents by giving public notice. It is a special and limited jurisdiction, and cannot be legally exercised, except within the provisions of the statute.

Statutes designed to give courts of equity power to affect directly by their decrees the title to lands or other

[12] 9 How. (U. S.) 336.
[13] Chancery Act of Ohio of 1824, sec. 12.

property within the courts' jurisdiction have generally assumed one of two forms: First, power may be granted to the court authorizing the appointment of a trustee, commissioner, or other officer to perform the decree by executing and delivering a deed of conveyance on behalf of the party whose duty to make such conveyance is established by the decree; or, second, the statute may provide that the transfer of title shall be accomplished by the direct effect of the decree without the intervention of the usual acts of conveyance. Under a statute of either type, the in rem character of the decree is manifest, and where provision is made for constructive service on non-resident defendants, specific performance of contracts capable of specific execution ought to be decreed as a matter of course and such seems to have been the unanimous holding of the courts in jurisdictions having such statutes.

In a recent decision of the Court of Appeals in New York,[14] a decree was granted for specific performance of a contract to convey title to land situated in New York, against the vendor, a resident of Connecticut, over whom the court obtained jurisdiction by the service on him in Connecticut of the summons and complaint. The statute provided that "Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state, or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property,"[15] the summons may be served out of the state, and also that "Where a judgment directs a party . . . to convey real property, if the direction is disobeyed, the court, by order, punishing the disobedience as a contempt, may require the sheriff . . . to convey the real property in conformity with the direction of the court."[16] The court, in speaking of the Practice Act, declared Sections 232 and 235 to be sufficiently broad to cover an action for specific performance and, in speaking of Section 979, said: "It has changed the nature of the action

[14] Garfein v. McInnis, 248 N. Y. 261.
[15] Civ. Prac. Act, secs. 232, 235.
[16] Civ. Prac. Act, sec. 979.

from an action in personam to an action substantially in rem." The same result was reached by the Supreme Court of Maryland in *Hollander* v. *Central Metal and Supply Co.*,[17] under a statute[18] authorizing constructive service in the following language:

If, in any suit in chancery, by bill or petition, respecting in any manner the sale, partition, conveyance or transfer of any real or personal property lying or being in this state, or to foreclose any mortgage thereon, or to enforce any contract or lien relating to the same, or concerning any use, trust or other interest therein, where any or all of the defendants are non-residents, the court in which such suit is pending may order notice to be given to such non-residents, of the substance and object of such bill or petition, and warning them to appear by a day therein stated.

Another section of the same article of the Code[19] authorized the court, whenever the execution of a deed of any kind is decreed to appoint a trustee to execute it. The court distinguished this case from *Worthington* v. *Lee, supra,* since, in the former, specific execution of the contract would require the assumption by the defendants of certain duties to be performed by them personally whereas the contract before the court in the latter case was susceptible of full performance by the transfer of title alone. In the same category belongs the case of *Clem* v. *Givens*,[20] where the Supreme Court of Virginia approved a decree requiring a non-resident trustee, notified by publication, specifically to perform a contract to convey land situated in Virginia. The section of the Code which the court held sufficient to make the proceeding one in rem provided:

A court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a Commissioner to execute the same; and the execution thereof shall be as valid to pass, release or extinguish the right, title and interest of the party on whose behalf it is executed as if such party had been at the time capable in law of executing the same and had executed it.[21]

[17] 109 Md. 131.
[18] Md. Code 1904, Art. XVI, sec. 117.
[19] Art. XVI, sec. 91.
[20] 106 Va. 145.
[21] Va. Code 1904, sec. 3418.

This section was subsequently incorporated in the Code of West Virginia[22] and has been held to have the same construction and effect as that given to it by the Supreme Court of Virginia.[23]

It seems to be the Federal rule that suits against non-resident owners for the specific performance of contracts relating to land situated within the district of the forum, will be entertained, where the statutory authorization is found in the laws of a state of the district in which the land has its site. In *Single* v. *Scott Paper Manufacturing Co., et al.*,[24] the complainant, a resident of the state of New York, sought and obtained a decree for specific performance against the defendants who were non-residents of the district and citizens of the state of Michigan. Service on the defendants was obtained, in conformity with the Federal practice, by the service upon the defendants in Michigan of certified copies of an order entered by the district court, directing that the defendants appear and defend the suit. The court in referring to its jurisdiction to enforce a remedy created by a statute of Ohio summarizes the effect of the local law thus:

If there were doubts as to whether under general equity rules and principles administered by this court, aided by the provisions of Section 738, the defendants could be brought within the jurisdiction of the court without personal service, the authority of the court to entertain such jurisdiction and administer the relief sought, is made more certain and effective by reason of the Ohio statutes. Section 5024, Rev. St. Ohio, authorizes an action to compel the specific performance of a contract for the sale of real estate. Section 5048 provides for constructive service in such cases. Section 5318 provides that, when a party against whom a judgment or a conveyance . . . is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available as if the conveyance . . . had been executed conformably to such judgment. Considering these statutory provisions in the light of the principles announced in the case of *Boswell's Lessee* v. *Otis,* above quoted, our jurisdiction in this case seems clear.

[22] Ch. 132, sec. 4.
[23] In Birch v. Covert, 83 W. Va. 752.
[24] 55 Fed. 553.

Arndt v. *Griggs*[25] is generally considered to have established the constitutionality of state laws which provide for decrees operative in rem against property owned by non-resident defendants who have been notified by publication, or otherwise, constructively subjected to the jurisdiction of the court within the territorial jurisdiction of which the property to be affected has its situs. The Nebraska Statute held constitutional in that case, provided generally for service by publication against non-resident defendants in actions which "relate to, or the subject of which, is real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation." It is arguable that this language does not embrace suits for specific performance, although a statute of substantially the same wording was held in *Garfein* v. *McInnis* to have that effect; but the principle laid down in this case is broad enough to sustain the jurisdiction in the specific performance cases where the local statute, whether of general or specific provisions, authorizes constructive service on non-resident defendants.

In a few jurisdictions the courts seem to have established an in rem jurisdiction over suits for specific performance without the aid of any statute. *Rourke* v. *McLaughlin*[26] was an action by a non-resident vendor to recover a judgment for the first instalment on a contract to convey land situated in the state of California. The resident purchaser interposed the defense that, should judgment be entered for the sum demanded and should he subsequently perform his undertaking by paying the whole of the agreed purchase price, he would be unable specifically to enforce the contract against the vendor. The court met this contention in saying that

> The fact that the plainiff may be beyond the jurisdiction of the courts of this state when the defendant may become entitled to a deed is wholly immaterial. His absence will neither prevent his making a deed voluntarily,

[25] 134 U. S. 316.
[26] 38 Cal. 196.

nor prevent the courts of this state from compelling a deed to be given by the plaintiff himself, or by a commissioner appointed to act in his place. The rule seems to be that specific performance will be decreed whenever the parties or the subject matter or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court.

But little attempt is made by the court to support its conclusion by reference to precedents, and it has been suggested that the result might have been different had not a California statute provided for the appointment of a commission to transfer title.[27] As Professor Walsh[28] has pointed out, the Supreme Court of Nevada has taken the same advanced position in *Robinson* v. *Kind*[29] without the aid of any statute. It was there said that actions to set aside fraudulent conveyances of real estate belong to the class of actions "for the recovery of real property, or of any estate or interest therein or of the determination in any form of such right or interest" and may be prosecuted against non-residents by publication. There can be little question as to the desirable character of the results consequent upon these decisions, but it may well be doubted whether the courts of these jurisdictions should have so definitely invaded the province of the legislature in bringing their law into harmony with the almost universal practice of the American jurisdictions.

In conclusion, it should be remembered that the enlargement of in rem jurisdiction of equity has by no means terminated, or even reduced, the traditional power of chancery to act in personam, and that now as always courts of equity may proceed against the person of a contumacious defendant and thereby compel him personally to perform the act required of him by the decree. Manifestly, in those cases, where specific performance of contracts affecting property without the jurisdiction of the court is sought, the decree must have an in personam operation exclusively.

[27] Boke, Cases on Equity, p. 75.
[28] Walsh, Equity, pp. 51, 52.
[29] 23 Nev. 330.